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EXTRATERRITORIALITY IN CHINA

Profound changes in the whole basis of China's existing relations with the other Powers are taking place with startling rapidity. Within the past few weeks the Powers have promised to restore tariff autonomy to China. Within the next few days China and the Treaty Powers will begin to examine the larger question of Extraterritoriality—the principal under which nationals of Treaty Powers in China are subject to their own laws and not to those of China. This Report contains a factual statement of the origin of extraterritoriality and the existing treaty provisions, as well as China's objections and the position of the Powers. It covers the following points:

Treaty Basis of Extraterritoriality

Why Extraterritoriality was Established

China's Efforts to Abolish the System

Advantages and Disadvantages to Foreigners

China's Case for Abolition

THE COMMISSION ON EXTRATERRITORIALITY

The Commission which meets in Peking December 18th has been called in pursuance of a "resolution regarding extraterritoriality in China", adopted at the Washington Conference on December 10, 1921. The governments represented at the Washington Conference, other than China, agreed to "establish a Commission (to which each Government shall appoint one member) to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the Governments of the several Powers above named their findings of

fact in regard to these matters, and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality."

The Treaty Powers to be represented on the Commission are: United States, Great Britain, France, Italy, Netherlands, Belgium, Japan and Portugal, as signatories of the Washington Conference resolution, and Denmark, Sweden, Spain, Peru by special adherence. The Commission is instructed to submit its report and recommendations within one year after its first meeting. Each Power is entirely free to accept or reject all or any portion of the recommendations; but in no case is it to make acceptance, in whole or in part, dependent on any special concession by China.

CHINA'S POSITION

China's official position with regard to the Commission is set forth in another resolution of the Washington Conference, which states "that China...expresses its satisfaction with the sympathetic disposition of the Powers hereinbefore named in regard to the aspiration of the Chinese Government to secure the abolition of extraterritoriality in China, and declares its intention to appoint a representative who shall have the right to sit as a member of the said Commission, it being understood that China shall be deemed free to accept or to reject any or all of the recommendations of the Commission. Furthermore, China is prepared to cooperate in the work of this Commission and to afford to it every possible facility for the successful accomplishment of its tasks."

DEFINITION OF EXTRATERRITORIALITY

In simple terms, extraterritoriality is defined by H. B. Morse as that principle by which "the foreign resident in China is subject to no provision of the law of China either as to his person or to his property (except that in the tenure of land the lex loci must apply), but at all times and in all places is entitled to the protection of his own national law administered by his own national officials."

Another authority, Charles S. Lobingier, former judge of the United States Court in Shanghai, says: "Extraterritoriality, or more properly extraterritorial jurisdiction is a system under which a sovereign power retains full control of its nationals in territory outside its own. This necessarily excludes the exercises of control over the same national by the sovereign power of the territory in which he is located. In other words, the national remains under his own laws and institutions instead of becoming amenable to those of the locality."

"TREATY POWERS" IN CHINA

In relation to China, the term "Treaty Powers" is generally used to designate not all the Powers which have treaty relations with China, but only those which have extraterritorial privileges. The following sixteen Powers enjoy extraterritorial rights today: Belgium, Brazil,

Denmark, France, Great Britain, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Spain, Sweden, Switzerland, United States. The other Powers, including Germany, Austria, Russia and most of the Latin-American republics, have no extraterritorial privileges in China, although some of them have treaties with China. Before the war, Germany, Russia and Austria-Hungary enjoyed extraterritorial rights.

TREATY BASIS OF EXTRATERRITORIALITY

Extraterritoriality has been in existence in China for eighty-two years. Although reciprocal extraterritorial jurisdiction was accepted in the treaty of 1689 with Russia, no unilateral agreement was made by China until after the Opium War in 1842.

In the "general regulations" annexed to the supplementary treaty with Great Britain in 1843, provision was made for punishment of British criminals by British officials under British law. The principle of extraterritoriality was first definitely applied, however, in the Treaty of Wanghia, 1844, with the United States, Articles 21 and 25 of which provide that subjects of China, guilty of criminal acts towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China; and citizens of the United States committing any crime in China shall be tried and punished only by the Consul, or other American functionary, according to the laws of the United States. They further provide that all questions of property or person, arising between citizens of the United States in China, shall be regulated by the authorities of their own Government. Controversies between citizens of the United States and subjects of any other Government shall be regulated by the treaties existing between the United States and such Governments respectively, without interference on the part of China.

Since this time extraterritorial privileges have been extended and clarified in a number of treaties between China and the Powers. In the Chefoo Agreement of 1876, between China and Great Britain, Section II, Clause 3, it was agreed that:

> "Whenever a crime is committed affecting the person or property of a British subject, whether in the interior or at open ports, the British Minister shall be free to send officers to the spot to be present at the investigation....It is further understood that, so long as the laws of the two countries differ from each other, there can be but one principle to guide judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice....The law administered will be the law of the nationality of the officers trying the case."

Additional provisions were enumerated in treaties with the United States and other Powers. By the operation of the most-favored nation clause, as among the Powers enjoying extraterritorial privileges in China, treaty provisions with one Power have become automatically effective for all other Treaty Powers.

THE EXTRATERRITORIAL SYSTEM—GENERAL SUMMARY

The situation created by the extraterritorial provisions may be summarized briefly as follows:

1. All controversies in which no foreigners are involved are tried in Chinese courts according to Chinese law. (Cases before the mixed court in Shanghai are an exception to this general rule).

2. Controversies between two or more nationals of the same Treaty Power are tried in the consular courts or other courts of that Power, and the law applied is that of the Power concerned. Chinese police officials may make arrests, in criminal cases, but the offenders must be turned over to their respective consuls.

3. Controversies between nationals of different Treaty Powers are determined, not by Chinese courts, but by the authorities and the laws of the States concerned according to agreements between these States.

4. Controversies between nationals of non-Treaty Powers and nationals of Treaty Powers in which the latter are defendants, are determined by the authoorities of the Treaty Powers. In civil or criminal suits in which the non-Treaty Power nationals are defendants, jurisdiction is in the Chinese courts. Controversies to which all the parties are non-Treaty Power nationals, or in which they appear as plaintiffs or complainants against Chinese defendants, are settled in Chinese tribunals under Chinese law.

5. Controversies between Chinese and nationals of Treaty Powers are determined by the tribunals of the defendant, and the law of his country is applied.

REASONS FOR ESTABLISHMENT OF EXTRATERRITORIALITY

The conditions which lead to establishment of extraterritoriality in China were summarized as follows by Sir Robert Hart, Inspector General of the Chinese Maritime Customs from 1863 to 1911: "When the first treaties were made China had had no experience of international dealings and no acquaintance with international relations, but the foreigners' knowledge of the many differences between Chinese and foreign action in matters affecting property or person was already of a kind to make him unwilling to accept Chinese procedure: it was, therefore, wise and, at that time, right for the foreign negotiator to stipulate that questions affecting the persons or property of foreigners should be arranged by the foreign authority, and, on the other hand, the Chinese officials who consented to that arrangement without stipulating for the various limitations, by which it ought to have been accompanied, can hardly be blamed for their want of political foresight, even had they been free to refuse acquiescence....When China acquiesced in various treaty stipulations it never occurred to her that what she was conceding was what now goes to constitute what is now termed extraterritoriality. The stipulations gradually

showed their shape, and what they concede and how such concessions operate on the country that grants them, are now increasingly understood in China."

H. B. Morse in "The Trade and Administration of China" says: "The principal grounds assigned by the foreigners at Canton generally and the British in particular for opposing the course of Chinese law were these: that the provisions of Chinese law were unjust, because of the indiscrimination between intentional and unintentional killing; that the Chinese courts did not often discriminate, with respect to Europeans at any rate, between accidental and wilful homicide; that the Chinese laws as they stood then were too harsh and severe in punishments, especially for offenses against the person; that the doctrine of extensive responsibility upheld by Chinese law in criminal matters is objectionable; that there was much maladministration of justice in the Chinese courts....

"The law of China was not the law of the West; the real point at issue, however, was not the difference in law but the uncertainty in its application—or, in plain terms, the certainty of corruption and bias in its administration."

CHINA'S EFFORTS TO ABOLISH EXTRATERRITORIALITY

1. Early Efforts

The consequences of extraterritoriality were not at first apparent to the Chinese, as there were only a handful of aliens in China at the time the first treaties were signed. But as the foreign populations increased, and new treaty ports were created, the evils of the system, from the viewpoint of China, revealed themselves. As early as the seventies the Chinese Government began to make efforts for modification of the system, and opposition to extraterritoriality became more persistent each year.

2. Promises of Abolition by the Powers

Some of the Powers officially recognized China's desire to abolish extraterritoriality as early as 1902-3, pledging themselves to surrender those rights when satisfied as to the state of Chinese laws. Article 12 of the British commercial treaty of September 5, 1902 (the MacKay Treaty) contains the first promise of abolition. It states that "China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant her in so doing."

A similar clause appears in the commercial treaties of 1903 with the United States and with Japan. Sweden has declared in her treaty of 1908 with China that "as soon as all the other Treaty Powers have agreed to relinquish their extraterritorial rights, she also will be prepared to do so."

3. China's Proposals at the Paris Conference

The Chinese Delegation at the Paris Peace Conference asked the Powers to agree to abolition of the entire system of extraterritoriality as soon as China should put into force her five new codes and complete the establishment of new courts in all the districts where foreigners reside. The Chinese Delegation asserted that China would be able to do this by the end of the year 1924.

The Delegation furthermore asked the Powers to agree to the following immediate changes in the present system:

"a. That every mixed case, civil or criminal, where the defendant or accused is a Chinese, be tried and adjudicated by Chinese courts without the presence or interference of any consular officer or representative in the procedure or judgment.

"b. That the warrants issued or judgments delivered by Chinese courts may be executed within the concessions or within the precincts of any building belonging to a foreigner, without preliminary examination by any consular or foreign judicial officer."

These demands were not granted by the Powers at the Peace Conference.

4. China's Request at the Washington Conference

At the Washington Conference Dr. Wang Chung-Hui, on behalf of the Chinese Delegation, stated that he had made his observations regarding the objections to extraterritoriality "not for the purpose of asking for an immediate and complete abolition of extraterritoriality, but for the purpose of inviting the Powers to cooperate with China in taking initial steps toward improving and eventually abolishing the existing system, which is admitted on all hands to be unsatisfactory both to foreigners and Chinese."

Dr. Wang asked, in the name of the Chinese Delegation, that the Powers now represented at this Conference agree to relinquish their extraterritorial rights in China at the end of a definite period. In the meanwhile, he proposed that the above-mentioned Powers should at a date to be agreed upon, designate representatives to enter into negotiations with China for the adoption of a plan for a progressive modification and ultimate abolition of the system of extraterritoriality in China, the carrying out of which plan was to be distributed over the above-mentioned period. In response to these Chinese proposals the other Powers represented at the Conference adopted the resolution referred to above.

5. Appointment of the Commission

At China's request the meeting of the Commission on Exterritoriality was postponed for one year. Two subsequent postponements were made at the request of the European Powers. Finally, however, in a note of June

24, 1925, the Chinese Government asked that steps should be taken to modify the existing treaties as far as the customs tariff and extraterritorial rights are concerned. In identic notes dated September 4, 1925, the nine Powers which had adopted the Washington resolution expressed readiness to appoint their representatives to the Commission on extraterritoriality provided for in that resolution. These Powers, as well as the Powers which have adhered to the resolution, have now appointed their commissioners and the Commission will meet on December 18th at Peking.

JURIDICAL POSITION OF NON-TREATY POWER NATIONALS

The effect of abolition on the position of Russians, Germans and nationals of other Powers who have lost or abrogated their extraterritorial rights is important in any consideration of extraterritoriality. It is impossible to get impartial evidence as to whether the nationals of these Powers have received just treatment under Chinese law. Recently, however, the privilege of pleading in Chinese courts has been extended to the nationals of all non-Treaty Powers.

By special provision in the Sino-German Agreement of May 20, 1921, "lawsuits of Germans in China shall be tried in the modern courts, with the right to appeal, and in accordance with the regular legal procedure. During the period of litigation, the assistance of German lawyers and interpreters who have been duly recognized by the court, is permitted."

As regards Russians in China, the Russo-Chinese Agreement of May 31, 1924, states that "the Government of the Union of the Soviet Socialist Republics agrees to relinquish the rights of extraterritoriality and of consular jurisdiction." There is further provision for a conference at which the two Governments shall establish "equitable provisions for the regulation of the situation created for the citizens of the U.S.S.R. by the relinquishment of the rights of extraterritoriality and consular jurisdiction, it being understood, however, that the nationals of the Government of the U.S.S.R. shall be entirely amenable to Chinese jurisdiction." The Conference formally opened on August 26, 1925.

OTHER RIGHTS NOT AFFECTED BY ABOLITION

There are a number of privileges enjoyed by many of the Powers, under special agreements with China, which would not be affected by abolition of extraterritoriality. The more important include the right of foreign ships and warships to operate in China's inland waters; the right of foreign merchants in certain Treaty Ports to form their own municipal government; the right to maintain police forces in foreign settlements, and the right to maintain troops in China as provided in the Protocol of 1901.

DISADVANTAGES OF THE EXTRATERRITORIAL SYSTEM TO FOREIGNERS

The advantages to foreigners of the extraterritorial system in China have been indicated in the treaty provisions quoted above. There remain a number of disadvantages to foreigners which may be summarized as follows:

1. As long as extraterritoriality is maintained it is practically impossible for the Chinese Government to open up the entire country to trade, manufacture and residence by the foreigner.

2. The extraterritorial system means a multiplicity of courts. Each nation is obliged to maintain tribunals for its own nationals at all of the Treaty Ports.

3. The courts are presided over by officials who are not, for the most part, trained in the law.

4. The system tends to create an anti-foreign feeling.

5. Under the extraterritorial system there is great difficulty in determining the law to be applied by the foreign courts.

6. The fact that extraterritorial courts necessarily have only a personal jurisdiction is a very serious disadvantage.

CHINESE ARGUMENTS FOR ABOLITION OF EXTRATERRITORIALITY

1. Disadvantages of Extraterritoriality to China

The main arguments for abolition or substantial modification of extraterritoriality were summarized as follows at the Washington Conference by Dr. Wang, of the Chinese Delegation:

"a. In the first place, it is in derogation of China's sovereign rights, and is regarded by the Chinese people as a national humiliation.

"b. There is a multiplicity of courts in one and the same locality, and the interrelation of such courts has given rise to a legal situation perplexing both to the trained lawyer and to the layman.

"c. Disadvantages arise from the uncertainty of the law. The general rule is, that the law to be applied in a given case is the law of the defendant's nationality, and so, in a commercial transaction between, say, X and Y of different nationalities, the rights and liabilities of the parties vary according as to whether X sued Y first, or Y sued X first.

"d. When causes of action, civil or criminal, arise in which foreigners are defendants, it is necessary for adjudication that they should be carried to the nearest consular court, which may be many miles away; and so it often happens that it is practically impossible to obtain the attendance of the necessary witnesses, or to produce other necessary evidence.

"e. Finally, it is a further disadvantage to the Chinese that foreigners in China, under cover of extraterritorality, claim immunity from local taxes and excises which the Chinese themselves are required to pay. Sir Robert Hart, who worked and lived in China for many years, had said in his book, 'These

from the Land of Sinim,' 'The extraterritoriality stipulation may have relieved the native official of some troublesome duties, but it has always been felt to be offensive and humiliating, and has ever a disintegrating effect, leading the people, on the one hand, to despise their own Government and officials, and, on the other, to envy and dislike the foreigner withdrawn from native control.'"

2. Chinese Progress in Legal Reform

Dr. Wang further stated that whereas it was a matter of opinion whether or not Chinese laws had attained the standard to which she was expected to conform, it was impossible to deny that she had made great progress on the path of legal reform. A law codification mission for the compilation and revision of laws had been sitting since 1904. Five codes had been prepared, some of which had already been put into the criminal code, in force since 1912, the code of all civil procedure and the code of criminal procedure, both of which had just been promulgated, and the commercial code, part of which had been put into force. Dr. Wang said that these codes had been prepared with the assistance of foreign experts and were based on the principle of modern jurisprudence. He mentioned especially a law of 1918, called "Rules for the Application of Foreign Laws," which dealt with matters relating to private international law and under which foreign law is given ample application. He declared also that a new system of law courts had been established in 1910, the judges of which are all modern trained lawyers.

According to the China Year Book, 1925, the Law Codification Commission has completed the final drafting of the penal code, the penal procedure code and the civil procedure code. The two procedure codes were promulgated in 1921; the revized penal code is awaiting promulgation. The Commission is at present engaged in the drafting of commercial laws. While not all of the new laws have been uniformly applied throughout China, "it cannot be denied that they constitute a marked advance along the path of legal reform."

ATTITUDE OF POWERS

With reference to the attitude of the major foreign Powers concerning the abolition of extraterritoriality, it was emphasized at the Washington Conference that it is a question "of fact rather than of principle," inasmuch as the United States, Great Britain and Japan had all defined the principle of relinquishing extraterritorial rights "when satisfied that the state of China's laws, the arrangements for their administration and other considerations" would warrant them in so doing. In the identic notes presented Sept. 4, 1925, to the Chinese Government by the Powers concerned, "The necessity of giving concrete evidence of its ability and willingness to enforce respect for the safety of foreign lives and property, and to suppress disorders and anti-foreign agitations—" was impressed upon the Chinese Government.

To investigate the extent to which China has achieved judicial reform and provided security to foreign lives and property, is the task assigned the Commission on Extraterritoriality.